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No. 713

In the Supreme Court of the United States

OCTOBER TERM, 1957

ESTATE OF JOHN B. HASKINS, DECEASED, H. KEITH HARBER, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 140a–156a) are not officially reported. The opinion of the Court of Appeals (Pet. 11–12) is reported at 249 F. 2d 143.

JURISDICTION

The judgment of the Court of Appeals was entered October 25, 1957. (Pet. 13.) The petition for a writ of certiorari was filed on January 8, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the evidence sustains the determination of both courts below that a part of the deficiency in the decedent's income taxes for each of the taxable years 1941–1947 was due to fraud with intent to evade tax.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.
>
> * * * * *
>
> (b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).
>
> (26 U. S. C. 1952 ed., Sec. 293.)
>
> SEC. 1112. BURDEN OF PROOF IN FRAUD CASES.
>
> In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner.
>
> (26 U. S. C. 1952 ed., Sec. 1112.)

STATEMENT

The facts as found by the Tax Court (R. 140a–150a) may be summarized as follows:

The decedent, John B. Haskins (hereafter called the taxpayer), was a physician and surgeon practicing in Chattanooga, Tennessee. He died in 1953. (R. 141a.)

Taxpayer's unreported income for the years 1941 to 1947, inclusive was attributable principally to additional professional income and to gains from the sales of real estate. (R. 141a–143a.) (As the Court of Appeals noted (Pet. 11), the amount of such unreported income for these years as reconstructed from all available records and found by the Tax Court (R. 141a, 143a) is not disputed.)

The following is a comparison of taxpayer's reported and unreported professional receipts for the years 1941 to 1947, inclusive (R. 145a):

Year	Professional receipts	
	Reported	Unreported
1941	$10,340.37	$21,404.78
1942	18,840.27	23,610.28
1943	18,739.67	26,054.98
1944	19,289.67	37,473.64
1945	20,390.27	47,355.06
1946	28,809.00	31,259.84
1947	34,618.55	[1] 18,631.60

[1] For the year 1948, taxpayer included in his return professional income of $42,134.04 and omitted such income to the extent of $3,577.33. The Tax Court held that the Commissioner had not established fraud by clear and convincing evidence for the year 1948. (R. 155a.)

In addition, the taxpayer had unreported taxable capital gains from the sale of real estate during the years 1941–1945, inclusive, as follows (R. 141a–143a, 146a):

1941	$83.08
1942	88.96
1943	6,809.77
1944	6,027.92
1945	606.09

All of taxpayer's real estate dealings during the taxable years in issue were handled by two real estate

agents, who furnished him a detailed statement of each purchase and sale of real estate at the time of the transaction. (R. 146a.)

Taxpayer's practice increased greatly during the years 1941 through 1945, and he treated an average of 70 to 100 patients a day. (R. 146a.) He gave no personal attention to the keeping of income records, either in connection with professional income or in connection with rents or capital gains from the sale of real estate. (R. 149a.) Taxpayer personally made no entries on his books or records. His office personnel kept the records of his professional income and deductions for each year. (R. 149a.)

Largely as a result of the war, personnel turnover in the taxpayer's office was high. The omissions of professional income from the taxpayer's cash receipts ledger were due to incompetent employees, careless bookkeeping, and the failure of the taxpayer to exercise any supervision or control over the bookkeeping, either individually or through competent auditors. (R. 147a.)

A certified public accountant prepared taxpayer's income tax returns for all of the years involved herein. The returns were made out by the accountant from statements of income and expenses prepared by employees in the taxpayer's office, with respect to professional income, and from information furnished by employees of the two real estate agents with respect to rents. The latter furnished no information with respect to profits from real estate transactions. The accountant never examined the taxpayer's books and records. (R. 147a.)

Each year, shortly before the taxpayer's income tax returns were due, employees in his office would prepare work sheets from his books and records. During the years 1944 to 1947, inclusive, these statements consisted of a list of the taxpayer's professional expenses, dividends, director's fees and personal deductions but did not include his professional income or rental income. After these work sheets were prepared, they were handed to the taxpayer who, in turn, would deliver them personally to the accountant or give them to someone in his office for delivery to him. (R. 147a.)

Subsequent to the receipt of the taxpayer's work sheets for each of the years 1944 through 1947, the accountant would telephone the taxpayer's office to ascertain his professional income. Someone in the taxpayer's office would give the accountant a figure supposedly representing the taxpayer's professional income which the accountant would insert on the taxpayer's work sheets and later transcribe to his income tax returns. (R. 147a–148a.)

A good deal of the time, the employees handling the taxpayer's books were as much as six and seven months behind in their bookkeeping entries. They kept this information from the taxpayer because they feared his reactions. Not only did they fail to do anything about it, but one of the employees, in answer to telephone inquires from the accountant, gave him gross receipts figures which she knew to be nothing but a guess. (R. 148a.)

The accountant would obtain the taxpayer's rental income by telephoning the offices of the taxpayer's

real estate agents. The accountant had been instructed by the taxpayer to procure from the real estate agents whatever information was required for income tax purposes. The taxpayer had also authorized the real estate agents to furnish such information to the accountant. The accountant procured no information with respect to the taxpayer's sales of properties and no such information was furnished to him by the real estate agents. (R. 148a–149a.)

Some time after the accountant was furnished the taxpayer's work sheets during each of the years in question, the taxpayer would go to the accountant's office, sign his income tax return and give the accountant a check, usually in blank, which he had signed but had not filled out. The accountant would then fill in the check with the amount of the tax owed as shown by the return and mail the check and the return to the Collector of Internal Revenue for the District of Tennessee. (R. 149a.)

Each of the taxpayer's returns for the years 1943 to 1947, inclusive, contains a printed certification, immediately above the signature of the taxpayer, reading as follows (R. 150a):

> I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

The certification on the return for 1942 is largely to the same effect. On the return for 1941, the certificate is in the form of an affidavit, but is otherwise

substantially the same as that contained on the 1942 return. The affidavit on the 1941 return was subscribed and sworn to by taxpayer (R. 150a.)

The Tax Court found on all the evidence that part of the deficiency in each of the years 1941 to 1947, inclusive, was due to fraud with intent to evade taxes and that the income tax returns of the taxpayer for each of the years 1941 to 1945, inclusive, were false and fraudulent with intent to evade taxes. (R. 150a.)

Upon the basis of the foregoing facts, the Tax Court, sustaining the Commissioner's determination (R. 140a), held that the taxpayer was liable for the 50% fraud penalties for the years 1941–1947 (R. 150a–155a) and that the assessment and collection of the deficiencies in income taxes and in the statutory additions thereto (fraud penalties) for the years 1941 through 1945 are not barred by the statute of limitations (R. 155a). The Court of Appeals, in a *per curiam* opinion, affirmed. (Pet. 11–13.)

ARGUMENT

The issue presented is wholly factual and was correctly decided by the Court of Appeals and the Tax Court. No further review is required.

1. The Tax Court summarized its findings of fact in the following language (R. 154a):

> The significant factors in the case are that the income on each of the returns was grossly understated, that the decedent subscribed the certificates which we have discussed to the effect that he examined the returns, that the only reasonable inference is that he did examine them, and that it must have been apparent to

him that there were gross understatements in each and omissions as to most.

These findings, affirmed by the Court of Appeals, do not warrant review here. *United States* v. *Gypsum Co.*, 333 U. S. 364, 395–395; *Schwarzkopf* v. *Commissioner*, 246 F. 2d 731 (C. A. 3d); *Lipsitz* v. *Commissioner*, 220 F. 2d 871, 876 (C. A. 4th); *Heyman* v. *Commissioner*, 156 F. 2d 389, 393–394 (C. A. 2d), certiorari denied, 338 U. S. 904.

The findings of fraud in this case do not rest upon the advice of an expert resolving a technical question of net income, but upon the taxpayer's failure to disclose his gross income from his professional receipts and long-term gains from the sale of real estate. The taxpayer did not disclose these facts even to his accountant. The latter simply prepared the returns upon the information furnished to him by the taxpayer's own employees or agents; the taxpayer personally signed and verified the returns, certifying as to their truth and correctness. (R. 150a.) It is obvious that the taxpayer cannot evade his personal duty to report his own income accurately by delegating the record keeping to his employees. *Cooper* v. *United States*, 9 F. 2d 216, 222 (C. A. 8th).

2. There is no conflict of decisions. *Bronson* v. *Commissioner*, 183 F. 2d 529 (C. A. 2d); *Davis* v. *Commissioner*, 184 F. 2d 86 (C. A. 10th); and *Eagle* v. *Commissioner*, 242 F. 2d 635 (C. A. 5th) are distinguishable. In each the taxpayer disclosed all of his income to an expert and the alleged deficiencies arose out of a technical tax question, not within the competence of a taxpayer and as to which he was entitled

to rely upon the opinion of the expert. In the case at bar, the taxpayer's accountant "never examined decedent's books and records" (R. 147a), nor were the deficiencies, as just noted, the result of an expert determination of net income, but of "gross understatements" of gross income (R. 152 (a)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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